No. 93-841

IN THE

Supreme Court Of The United States

October Term 1993

Supreme Court, U.S.
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THE CITY OF NEW YORK, *et al.*,

Petitioners,

v.

THE HERTZ CORPORATION,

Respondent.

ON PETITION
FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

BEST AVAILABLE COPY

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35 pp

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether the Second Circuit was correct in determining that New York City's so-called "Hertz Law" may be preempted by the Sherman Act because it eliminates one aspect of competition between horizontal competitors but does not constitute a wholly "unilateral" restraint on competition?

STATEMENT PURSUANT TO SUPREME COURT RULE 29.1

Pursuant to Supreme Court Rule 29.1, respondent The Hertz Corporation identifies the parent companies and non-wholly owned subsidiaries of The Hertz Corporation as follows:

AB Volvo
Axus Luxembourg S.A.
Axus S.A.
Commerzbank Aktiengesellschaft
Ford Motor Company
Hertz Equipment Rental (France) S.A.
Leascar S.A.
Locaplan S.A.
Park Ridge Limited Partnership
United Truck Leasing, Inc. (Minnesota)

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BRIEF FOR THE RESPONDENT IN OPPOSITION

On March 12, 1992, the New York City Council passed a law prohibiting car rental companies from imposing "fees or charges" based on the residence of the renter [hereinafter "Hertz Law"]. *See* N.Y.C. Local Law, Int. No. 71-A, § 1, 1-A Proceedings of the Council of the City of New York 838 (1992), reprinted in its entirety at A43-44; JA49, 274.[1] The Hertz Law was passed in response to respondent The Hertz Corporation's ("Hertz") January 1992 decision to charge different and increased rates to the residents of four New York boroughs who rent cars in New York

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[1] References to a number preceded by an "A" are to the appendix to the petition for a writ of certiorari. References to a number preceded by "JA" are to the joint appendix filed in the Second Circuit.

City and surrounding areas. *See* Report for the City Council Committee on Consumer Affairs, at JA291-92.[2]

Hertz challenged the Hertz Law, arguing, among other things, that it was preempted by the Sherman Act. (*See* A45-59.) The district court dismissed the complaint, but enjoined the City from putting the Hertz Law into effect pending appeal. (*See* A25-26.) The Second Circuit reversed, holding that the Hertz Law would in fact be preempted by Section 1 of the Sherman Act, 15 U.S.C. § 1 (Supp. 1993), unless it passed a rule-of-reason inquiry and remanded the case to the district court for further proceedings. *See Hertz Corp. v. City of New York*, 1 F.3d 121, 125-31 (2d Cir. 1993).[3] The district court has continued the injunction pending further order. *See* Transcript of district court conference, attached hereto as Appendix A, at RA12-13.

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[2] In the preceding three-year period, Hertz lost about $70 million in the New York City region, due in part to New York's vicarious liability law. (*See* JA27-30, 36.) After an extensive study, Hertz calculated the new rate by aggregating the total liability losses from renters who reside in the different boroughs and then by dividing the loss figures by the total rental volume for each borough, measured in rental days. This calculation produced the liability losses per rental day for each area. The "normal" loss rate (defined as the loss rate attributable to residents of Staten Island and non-city residents) was subtracted, yielding "excess" loss that was attributable to renters living in the four boroughs as follows: $56.44 for Bronx residents, $34.10 for Brooklyn residents, $3.80 for Manhattan residents and $15.47 for Queens residents. Hertz then increased its rental rates by those amounts (rounded down to the nearest dollar). (*See* JA327-32.) It is not the case, as petitioners assert, that Hertz could have achieved the same result by increasing its rates for all New York Region rentals—including rentals to out-of-state residents—by $3.29 per day. (*See* Petition for Writ of Certiorari [hereinafter "Cert. Pet."] at 6.) The car rental business is competitive and there was no evidence that Hertz could have raised its rates for all renters without losing an unacceptably high amount of business. (*See* JA44-45.)

[3] The Second Circuit also reinstated Hertz's claim that the Hertz Law violates the Commerce Clause of the United States Constitution. *See Hertz*, 1 F.3d at 131-32. The opinion of the Second Circuit in *Hertz Corp. v. City of New York* is reprinted in its entirety at A1-24.

SUMMARY OF THE ARGUMENT

The Second Circuit correctly determined that the Hertz Law might be preempted by the Sherman Act and its opinion reflected a straightforward application of established Supreme Court precedent. Moreover, there is no conflict with the decisions of other circuits and other courts. Consistent with well-established precedent, the Hertz Law may be subject to preemption by the Sherman Act and is not exempted from preemption as a "unilateral" restraint since the government does not set the price to be charged or review the reasonableness of the prices charged. Further, it is premature to review the Second Circuit's decision because the case must be remanded to the district court for additional proceedings even if the Court grants the petition.

ARGUMENT

I. THE SECOND CIRCUIT'S DETERMINATION THAT THE HERTZ LAW IS SUBJECT TO SCRUTINY UNDER SECTION 1 OF THE SHERMAN ACT WAS IN COMPLETE HARMONY WITH THE PRECEDENTS OF THIS COURT AND WITH THOSE OF OTHER COURTS.

A. The Second Circuit Properly Applied the Precedents of This Court.

The Second Circuit determined that the Hertz Law restrained competition between horizontal competitors and that it did not constitute a "unilateral restraint" of the type that would have exempted it from antitrust scrutiny. *See Hertz*, 1 F.3d at 125-27.

It is unnecessary for this Court to review the Second Circuit's opinion because its determination that this law was subject to antitrust scrutiny was correct and in full harmony with this Court's decisions in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951); *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *Fisher v. City of Berkeley*, 475 U.S. 260 (1986); and *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987). Those decisions make clear that, subject to the exception discussed below, no state or municipality

not otherwise immune may enact, as New York City has done here, legislation that limits price competition between horizontal competitors. Any attempt to do so would be preempted by and in violation of the Sherman Act. *See, e.g., Schwegmann*, 341 U.S. at 386-87, 389 (statute prohibiting liquor retailers from charging less than a specified price is invalidated because it "compels retailers to follow a parallel price policy" and therefore "demands private conduct which the Sherman Act forbids"); *Midcal*, 445 U.S. at 99-100, 103 (statute requiring liquor wholesalers to charge retailers the same price that was posted is invalidated because it "destroys horizontal competition"); *see also* 1 Phillip E. Areeda & Donald F. Turner, *Antitrust Law* ¶ 209 (1978); Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 209.1a (Supp. 1992). Statutes that limit price competition are said to be preempted by Section 1 of the Sherman Act since they authorize or compel private parties to engage in "anticompetitive behavior". *See 324 Liquor*, 479 U.S. at 345 n.8. Municipalities may not enact such legislation.

As the Second Circuit correctly concluded, the Hertz Law is subject to antitrust scrutiny because it restrains horizontal competitors—Hertz and the other car rental companies—from engaging in residence-based price competition. *See Hertz*, 1 F.3d at 125. Petitioners do not challenge the Second Circuit's finding in that regard. The sole question that petitioners raise is whether the Second Circuit should have found that the Hertz Law is saved from preemption on the ground that it is a "unilateral restraint". We submit that there is no reason for the Court to review that question, since this Court's decisions clearly compel the conclusion that the Hertz Law is not such a wholly "unilateral" restraint but is rather a "hybrid" restraint, subject to antitrust scrutiny.

Fisher, the case on which petitioners primarily rely, involved a claim that a rent control ordinance was preempted by Section 1 of the Sherman Act. *See* 475 U.S. at 265-67. This Court upheld the rent control ordinance even though it compelled anticompetitive behavior because it involved "unilateral action outside the purview of § 1". *See id.* at 266-70. However, *Fisher* did not undermine the preemption rule articulated in the Court's

two earlier decisions, *Schwegmann* and *Midcal*; indeed, the *Fisher* Court reaffirmed that rule. *Fisher* stated that those two cases involved statutes that were "hybrid" restraints, that is, statutes that do not involve wholly "unilateral" action like the restraint in *Fisher*. *See id.* at 267-69. Thus, *Fisher* simply represents an application of the preemption rule to a specific fact situation in which, unlike here, the municipality set the maximum price that could be charged and reviewed its reasonableness, leaving no room for the market participants to become involved in the pricing mechanism. *See id.* at 262, 269.

Nevertheless, petitioners argue that the Hertz Law is like the rent control ordinance in *Fisher* because "it does not authorize discretionary anticompetitive conduct by private parties" but instead "merely forbids using an automobile renter's residence as a basis for charging additional rental fees". (Cert. Pet. at 14.) However, it is precisely because the Hertz Law eliminates one aspect of price competition—competition based on residence—but does not provide that the government set and review the prices to be charged, that it is a "hybrid" law subject to antitrust scrutiny.[4]

Schwegmann, *Midcal*, and *324 Liquor*, the three cases on which we principally rely, make it clear that a statute that regulates prices—either by authorizing or mandating that certain prices be charged or not charged—is a "hybrid" restraint unless it provides that the government set the mandated price and review the reasonableness of the price set. It is this "involvement of [private parties] in setting those prices [that] ma[kes] it impossible to characterize the regulation as unilateral action by the State". *See Fisher*, 475 U.S. at 268 (discussing *Schwegmann*).

In articulating the distinction between "hybrid" and "unilateral" restraints, the Court in *Fisher* discussed the statutes that were struck down in *Schwegmann* and *Midcal* in language similar to that used by the Second Circuit below. *Compare Fisher*, 475 U.S. at 267-69 with *Hertz*, 1 F.3d at 126-27. The

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[4] Car rental companies in New York do in fact compete on the basis of residence-based pricing. (*See* JA317.)

Schwegmann statute allowed distributors to stipulate the minimum price at which goods could be sold at retail. *See Schwegmann*, 341 U.S. at 386-87. Once the distributor so stipulated and any one retailer agreed to abide by the price,[5] the Louisiana statute required that all other retailers—even the non-consenting retailers—abide by the price restrictions. *See id.* at 387.

The *Schwegmann* statute was a "hybrid" statute subject to Sherman Act scrutiny because the involvement of private parties "in setting those prices made it impossible to characterize the regulation as unilateral action by the State of Louisiana". *Fisher*, 475 U.S. at 268.

The *Midcal* statute required wine producers to set prices that wholesalers would charge to retailers. *See Midcal*, 445 U.S. at 99. If a wine producer did not set the prices, the statute required wholesalers to post the wholesale price for that producer's brands. *See id.* No wholesaler could sell wine to a retailer at other than those prices. *See id.* The *Midcal* Court invalidated that statute because it curtailed the ability of competitors—wholesalers in this case—to compete on prices. *See Midcal*, 445 U.S. at 103. The statute

> "destroys horizontal competition as effectively as if wholesalers 'formed a combination and endeavored to establish the same restrictions . . . by agreement with each other'".

Id. (quoting *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911)).[6]

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[5] When *Schwegmann* was decided, the price-fixing agreement itself was authorized by the since-repealed Miller-Tydings Act. *See Fisher*, 475 U.S. at 268.

[6] Professors Areeda and Hovenkamp have observed that

> "the California statute was preempted by federal antitrust law, and the reason was clear: it brought about the same marketplace result as illegal resale price maintenance agreements. Suppliers were not only authorized to specify retail prices, they were compelled to do so. Dealers were not only permitted to comply with the supplier's specification, they also were

The *Fisher* Court likened the *Midcal* statute to the one in *Schwegmann*, stating that the "trade restraint condemned in *Midcal* entailed a similar degree of free participation by private economic actors" since, under the *Midcal* ordinance:

> "'The State has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers.'"

Fisher, 475 U.S. at 268-69 (quoting *Midcal*, 445 U.S. at 100). In contrast to the statutes involved in those cases, the Berkeley rent control ordinance

> "places complete control over maximum rent levels exclusively in the hands of the Rent Stabilization Board. Not just the controls themselves but also the rent ceilings they mandate have been unilaterally imposed on the landlords by the city."

Fisher, 475 U.S. at 269.

Thus, what made the *Schwegmann* and *Midcal* statutes "hybrids" and the *Fisher* rent control ordinance "unilateral" was the fact that the *Fisher* statute provided that the government set the mandated price and review its reasonableness; the *Schwegmann* and *Midcal* statutes did neither. That indeed is the key distinction between the two. Professors Areeda and Hovenkamp have explained that

> "the key to understanding *Fisher* and to reconciling it with the earlier cases is to identify the factor that made the earlier preemption-notwithstanding-nonagreement cases 'hybrids.' This is readily done. The *Fisher* Court itself characterized the

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compelled to do so. Furthermore, dealer compliance was enforced not merely by the supplier's ability to terminate non-complying dealers but by public authorities as well. With results so inconsistent with those mandated by the Sherman Act—results that, in the absence of the state statute, could ordinarily be obtained only through agreements violating the Sherman Act—the Supreme Court had no difficulty holding that the statute was preempted."

Areeda & Hovenkamp, *supra*, at 96.

> hybrid cases as ones in which the preempted state laws 'granted' private actors "'a degree of private regulatory power.'" The vice of the state regime in *Midcal* was that *California "'has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers.'" By contrast, the presence of genuine public control over rental prices is what saved the Berkeley ordinance from preemption.*"

Areeda & Hovenkamp, *supra*, ¶ 209.1c, at 101 (footnotes omitted) (emphasis added).[7]

In *324 Liquor*, a case decided a year after *Fisher*, the Court struck down another "hybrid" statute as preempted by Section 1 of the Sherman Act. *See 324 Liquor*, 479 U.S. at 335, 343, 352. That statute prohibited retailers from pricing their products below 112% of the wholesaler's posted price. *See id.* at 337. As in *Midcal* and *Schwegmann*, that statute was a "hybrid" statute subject to antitrust scrutiny because while it prohibited retailers from charging certain prices—below 112% of the wholesaler's posted price—it did not provide that the government actually set the mandated minimum price and review the reasonableness of the prices set by the retailers. *See id.* at 345 & n.8.

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[7] The Court in *Fisher* did not impose a requirement that there be an "agreement" to find preemption under Section 1 of the Sherman Act. As Professors Areeda and Hovenkamp have explained:

> "Although the Court [in *Fisher*] thus seemed to hold that an illegal agreement was a prerequisite to preemption, it did not do so, for it readily reaffirmed the preemptions found in *Schwegmann* and *Midcal*. In those cases, it will be recalled, the states had also acted unilaterally and there were no private agreements. The Court squared its apparent requirement of an agreement with those cases by characterizing them as 'hybrid' situations. Hence, the key to understanding *Fisher* and to reconciling it with the earlier cases is to identify the factor that made the earlier preemption-notwithstanding-nonagreement cases 'hybrids.'"

Areeda & Hovenkamp, *supra*, ¶ 209.1c, at 101 (footnotes omitted).

The Second Circuit applied those precedents and properly

> "conclud[ed] that the Hertz law [was] not a 'unilateral' restraint. . . . because it removes one element of competition in car-rental pricing, but does not further regulate or review the prices set by rental companies."

Hertz, 1 F.3d at 127.

That holding was unquestionably correct. The Hertz Law mandates that car rental companies must charge the same price to residents of one borough that they charge to residents of another borough. However, the car rental companies, not the City, will determine what the mandated price will be, and there is no provision for the City to review the prices that are set. Thus, like the statutes at issue in *Midcal*, *Schwegmann*, and *324 Liquor*, the Hertz Law regulates the prices that may be charged but does not provide that the government set the mandated prices nor provide for governmental review of their reasonableness. The City "'has no direct control over . . . prices, and it does not review the reasonableness of the prices set'". *Fisher*, 475 U.S. at 269 (quoting *Midcal*, 445 U.S. at 100). Consequently, the Hertz Law is a "hybrid" restraint and therefore does not "constitute unilateral action outside the purview of § 1". *See Fisher*, 475 U.S. at 267. The involvement of the car rental companies "in setting those prices mak[es] it impossible to characterize the regulation as unilateral action" by the City of New York. *See id.* at 268.

In fact, the Hertz Law imposes a restraint that is very similar to the one found to be a "hybrid" restraint in *Midcal*. As we have noted, the statute at issue in *Midcal* required that wholesalers charge retailers the same prices that were set either by producers or by the wholesalers themselves. *See Midcal*, 445 U.S. at 99. Although the statute mandated that a certain price be charged, it did not provide that the government actually set the mandated price; that was left up to private parties. *See id.* at 100.

The statute involved here is very similar. The Hertz Law mandates that certain prices be charged—that is, the same price for residents of different boroughs—but, like the statute in *Midcal*, it does not set the actual price to be charged to those

residents. That is left up to the car rental companies, just as the statute in *Midcal* left up to the producers and/or wholesalers the actual prices that the wholesalers were required to charge retailers.[8]

Further, the Hertz Law is unlike the ordinance in *Fisher*, which not only mandated that certain prices not be charged, but also set the maximum prices and provided for review of those prices by the City's Rent Stabilization Board. *See Fisher*, 475 U.S. at 262, 267, 269. Here, by contrast, there is a mandated price that rental companies must charge—the same price for all New York City residents—but the City does not mandate what that price must be or review its reasonableness.[9] Thus, the Hertz

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[8] That the *Midcal* statute gave producers the power to set the prices charged by *another entity* (*i.e.*, the wholesalers) is immaterial. To be sure, the Court in *Fisher* stated that a "hybrid" statute exists "[w]here private actors are. . . granted 'a degree of private regulatory power'", 475 U.S. at 268 (quoting *Rice v. Norman Williams Co.*, 458 U.S. 654, 666 n.1 (1982) (Stevens, J., concurring)), but that meant that the "'State has no direct control over . . . prices, and it does not review the reasonableness of the prices set'", 475 U.S. at 269 (quoting *Midcal*, 445 U.S. at 100). So long as a private party, as opposed to the State, has "control" over the mandated prices, whether it is the party's own prices or not, the regulation is a "hybrid" restraint and cannot be said to "constitute unilateral action outside the purview of § 1". *See Fisher*, 475 U.S. at 267.

Petitioners acknowledge this point. In explaining why the statute in *Miller v. Hedlund*, 813 F.2d 1344, 1346-47 & n.1 (9th Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988), which required wholesalers to post their prices and then abide by them, was a "hybrid" restraint, the City stated that the statute "created an elaborate anticompetitive price maintenance structure and then let private actors use this anticompetitive framework *to fix their own prices*". (Cert. Pet. at 20 (emphasis added).)

[9] In explaining why the Hertz Law merits "hybrid" treatment, the Second Circuit stated that, unlike the rent control ordinance in *Fisher*, the Hertz Law "is not a 'pure regulatory scheme'" in which there is an "independent, quasi-judicial board that . . . could adjust rates and provide relief in individual circumstances". 1 F.3d at 127 (citation omitted). Petitioners argue that the Second Circuit should not have considered such factors, claiming that they "are not germane under *Fisher*". (Cert. Pet. at 22.) On the contrary, they are relevant in determining whether the statute provides for governmental "review [of] the reasonableness of the prices set". *See Fisher*, 475 U.S. at 269 (quoting *Midcal*, 445 U.S. at 100).

Law is plainly a "hybrid" restraint, and cannot be considered "unilateral action outside the purview of § 1". *See Fisher*, 475 U.S. at 267.

B. The Decision Below Was Not in Conflict with the Decisions of Other Courts.

Petitioners argue that the decision below "conflicts" with the decisions of other circuits and state courts. (*See* Cert. Pet. at 14, 17-23.) It does not.

Petitioners cite and discuss four cases: *Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1987), *cert. denied*, 484 U.S. 1061 (1988); *Municipal Utils. Bd. v. Alabama Power Co.*, 934 F.2d 1493 (11th Cir. 1991); *Schwegmann Giant Super Markets v. Edwards*, 552 So.2d 1241 (La. Ct. App. 1989), *writ denied*, 556 So.2d 1280 (La. 1990), *cert. denied*, 496 U.S. 938 (1990); and *Englert v. City of McKeesport*, 872 F.2d 1144 (3d Cir.), *cert. denied*, 493 U.S. 851 (1989). None of those cases "conflicts" with the decision below. In fact, only one of them, *Miller*, involved a challenge to a statute that regulates prices.

Miller, which was decided after *Fisher*, involved a preemption challenge to an Oregon liquor pricing regulation that required wholesalers to post their prices in advance and then to adhere to those prices for a certain period of time. *See* 813 F.2d at 1346-47 & n.1. The Ninth Circuit concluded that, like the statutes in *Schwegmann* and *Midcal*, the Oregon statute compelled anticompetitive behavior. *See id.* at 1350-51.

> "If the wholesale beer and wine distributors had entered into a private agreement to accomplish what is otherwise required by the Oregon regulations, there is no question that a *per se* violation of Section 1 of the Sherman Act would be found."
>
> "While it is true that there is no agreement or concerted activity among the wholesalers, it can not be ignored that the challenged regulations facilitate the exchange of price information and require adherence to the publicly posted prices. In other words, the state compels activity that would otherwise be a *per se* violation of the Sherman Act."

813 F.2d at 1349.

The defendants in *Miller* argued that the statute could not be struck down because "the wholesalers merely act unilaterally in response to the requirements of the regulations". *Id.* at 1349. The Ninth Circuit rejected that argument. It concluded that the Oregon regulations were "hybrid" restraints, in reasoning remarkably similar to the Second Circuit's below. The *Miller* court stated that

> "Schwegmann and Midcal show that Oregon's actions are not unilateral. The regulations constitute a 'hybrid' restraint because, as in those two cases, Oregon *allows private parties to set the prices and does not review the reasonableness of those prices.*"

Id. at 1351 (emphasis added).

Like the Hertz Law, the *Miller* statute was found to be a "hybrid" precisely because it mandated that a certain price be charged—the price posted by the wholesaler—but did not provide that the government fix the mandated price or review its reasonableness. *See id.* at 1351. The decision below is clearly consistent with *Miller.*

The other cases cited by petitioners are similarly not in conflict with the Second Circuit's decision. In fact, since they did not involve statutes that regulate prices, those cases did not even consider what was necessary for a pricing regulation to be a "hybrid" restraint, much less reach a result contrary to the Second Circuit's holding.

Alabama Power involved facial challenges to two state statutes that specified what territories electrical providers could serve. *See* 934 F.2d at 1497, 1501. The statutes were defended on the ground that even if the statutes were anticompetitive, there was "state action immunity". *See id.* at 1501-05. The Eleventh Circuit, in a classic and correct articulation of the state action immunity doctrine, stated that the statutes were immune from attack if the statutes: (1) "w[ere] implemented pursuant to a clearly articulated state policy restraining competition; and (2) the policy was actively supervised by the state". 934 F.2d at 1501. Both prongs of that test were met with regard to the general

provisions of the statutes and those provisions of the statutes were upheld under the principle of state action immunity. *See id.* at 1502-05.

The court in *Alabama Power* did rely somewhat on *Fisher*'s analysis of "hybrid" restraints, but it did so as part of its analysis as to why the "supervision prong" of the immunity test was satisfied. *See* 934 F.2d at 1503.[10] That analysis lends nothing to petitioners' argument.

In *Edwards*, the Louisiana Court of Appeal upheld a statute requiring beer retailers to pay cash when purchasing from wholesalers. *See* 552 So.2d at 1243, 1248. Credit sales were prohibited. *See id.* at 1243. With regard to the preemption issue, the court upheld the statute on the ground of state action immunity. *See* 552 S.2d at 1244-45. While the *Edwards* court discussed *Fisher*'s "hybrid" rationale, that discussion was again limited solely to a determination of the immunity issue, and adds nothing here. *See id.* at 1245.

Englert involved a city resolution that made one company the only company authorized to make the electrical inspections required to obtain occupancy permits from the city. *See* 872 F.2d at 1146. There was no claim of preemption in *Englert*. Instead, the plaintiff alleged that the defendant city, by passing the resolution and the defendant inspection company, in performing thereunder, had entered into an agreement that violated Section 1 of the Sherman Act. *See id.* at 1145, 1151. The court, citing

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[10] Contrary to petitioners' claim that *Fisher* treated the immunity and "unilateral" restraint issues as one and the same, *see* Cert. Pet. at 18 n.7, *Fisher* made it clear that they were not.

> "Because . . . the rent controls established by Berkeley's Ordinance lack the element of concerted action needed before they can be characterized as a *per se* violation of § 1 of the Sherman Act, we cannot say that the Ordinance is facially inconsistent with the federal antitrust laws. *We therefore need not address whether, even if the controls were to mandate § 1 violations, they would be exempt under the state-action doctrine from antitrust scrutiny.*"

475 U.S. at 270 (citations omitted) (emphasis added).

Fisher, found the proof insufficient to establish the necessary agreement. *See id.* at 1152. "[T]here were no activities indicating unlawful concerted action in violation of the Sherman Act". *Id.*[11]

Thus, petitioners' contentions notwithstanding, there is clearly no "conflict" between the decision of the Second Circuit and that of any other court. The Hertz Law is not a wholly "unilateral" restraint on competition since it regulates prices to a degree but does not provide for the government to set the prices or review their reasonableness. Consequently, it is a "hybrid" restraint, subject to a preemption challenge under Section 1 of the Sherman Act.

II. IT IS PREMATURE TO REVIEW THE SECOND CIRCUIT'S DECISION.

It has long been the practice of the Court not to review non-final judgments such as the one here unless such a review is "'fundamental to the further conduct of the case'". *See Land v. Dollar*, 330 U.S. 731, 734 n.2 (1947) (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945)). Here, no matter what this Court does, the case will be remanded to the district court. Even if this Court should grant the petition and reverse the Second Circuit on the antitrust claim, the district court must still hear the Commerce Clause claim. Thus, there is no compelling reason for a review now. Even if the Court believes that the Second Circuit was wrong, it would be far more efficient and appropriate, we submit, to review its rulings after a full record has been made in a *nisi prius* court. Only four days elapsed between the filing of the complaint and the appeal on which the

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[11] Petitioners also cite *Penn v. City of San Diego*, 233 Cal. Rptr. 514, 517 n.3 (Ct. App. 1987), and *Traffic Jam & Snug, Inc. v. Michigan Liquor Control Comm'n*, 716 F. Supp. 1024, 1026 (E.D. Mich. 1989), *aff'd*, 899 F.2d 15 (6th Cir. 1990). Neither case adds anything to their argument. *Penn* involved a San Diego ordinance, like the one upheld in *Fisher*, that set the maximum hourly price charged to card players. *See* 233 Cal. Rptr. at 517 n.3. The statute in *Traffic Jam*, like the statutes in *Alabama Power* and *Edwards*, was upheld on the ground of state action immunity and also did not involve price setting. *See* 716 F. Supp. at 1025, 1028.

petition is based. There has been no discovery; indeed the complaint has not even been answered. This petition is premature.

CONCLUSION

For the reasons stated above, respondent The Hertz Corporation submits that the petition for a writ of certiorari to review the decision of the Second Circuit should be denied.[12]

December 22, 1993.

Respectfully submitted,

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[12] Should the petition be granted, we are filing herewith a cross-petition for a writ of certiorari so that this Court could address the question whether the Second Circuit should have found that the Hertz Law was subject to a *per se* analysis, rather than subject to a rule-of-reason analysis, and if not, whether the standards for the rule-of-reason analysis were correctly stated.

APPENDIX A

TRANSCRIPT OF DISTRICT COURT CONFERENCE

SEPTEMBER 8, 1993

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE HERTZ CORPORATION	§	92 Civ. 2192 (WK)
	§	
Plaintiff,	§	
-against-	§	
	§	
THE CITY OF NEW YORK,	§	
O. PETER SHERWOOD, and	§	
MARK GREEN,	§	
	§	
Defendants.	§	

September 8, 1993
3:30 p.m.

Before:

HON. WHITMAN KNAPP,

District Judge

APPEARANCES

CRAVATH, SWAINE & MOORE
Attorney for plaintiff
by: PAUL C. SAUNDERS
JOHN CALANDRA

THE CORPORATION COUNSEL OF
THE CITY OF NEW YORK
Attorney for defendant
by: LORNA G. GOODMAN

(In Chambers)

THE COURT: I believe this is an application by the City for placing a bond.

MS. GOODMAN: We have a problem here, your Honor, and I would just like to recap for the record what happened here. Hertz enacted this rate schedule. The City Council then enacted a law which made the rates schedule illegal. Hertz then came into this court and challenged it on a number of grounds. Your Honor granted our motion to dismiss, but because there was one issue which in your opinion was up in the air a bit, which was the preemption issue, you gave them under 62(c) of the Federal Rules of Civil Procedure an injunction pending appeal.

The order said the injunction was in force pending the outcome of the appeal or until the Court of Appeals shall have modified or vacated this order. I think we all anticipated that the Court of Appeals, just as Mr. Saunders pointed out, would decide this definitively. In fact, as you know, they didn't decide it definitively. But they didn't say Hertz wins or the City wins. What they said is we can't dismiss this on the face of it. We have to go back and have a trial.

It's our position that when that appeal was completed and the mandate was entered that your injunction expired, was no more. The words of it were "pending the outcome of the appeal."

I think that that has to be the right interpretation of that injunction, because the injunction was granted for purposes of them obtaining a decision on this iffy issue. If the injunction were maintained now it would be maintained in light of a totally different underlying situation.

What we have now is a direction from the Second Circuit to go to trial on a very specific factual issue, the anti-competitive nature of this enactment on the one hand, and on the other hand, the evil to be prevented, the burden on minorities and the working poor of having this kind of rate structure. The commerce clause has to do with extraterritorial effect which the Second Circuit has given us a road map of the things we have to prove, and they have to prove before your Honor. Given that situation, I don't

think that the injunction which you issued has anything at all to do with the situation which is now before us, and I think that if Hertz wishes to have an injunction they should make a motion and show how they will prevail or how they have a likelihood of success and how they are irreparably injured.

Our position is the injunction is gone. We certainly will give Mr. Saunders time to make his motion for a new injunction, based on the facts which now exist, and that is our position.

MR. SAUNDERS: Your Honor, let me separate my remarks into two pieces. First, let me talk about the procedural aspects of this and then second, let me talk a little bit about the merits of the issue.

On the procedural issue we are in this posture. When we first came before your Honor, the very first time we saw you, I think we sat in this room, and it was the very same day on which the City Council had passed the so-called Hertz Law and within minutes afterwards we filed the action that we filed in this court and then we came to see your Honor that afternoon.

We were concerned that unless something were done to preserve the status quo the City law might become effective, thereby either requiring Hertz to lower its rates and to incur a loss, which we had demonstrated in the papers that we filed before you that the rates that were imposed by Hertz were imposed in order to offset losses that Hertz was incurring, and we were also concerned that if the law were in effect while this case was pending before your Honor, and then later in the Court of Appeals, there would be great confusion. Even if the City said they were not going to enforce the law —

THE COURT: They haven't said that.

MR. SAUNDERS: They haven't said that, but even if they said they weren't going to enforce the law there would be great confusion in the marketplace because I could envision a situation in which a customer would come to the Hertz counter with a copy of the law in his hand and say, "You can't charge me this extra rate." Even if the City Consumer Affairs Commissioner was not going to enforce it the customer would have the law in his hand

and say the rate is illegal and so forth. So there would really be chaos on the one hand. And on the other hand, Hertz would clearly suffer losses in the interim period for which it could never be compensated or recompensed.

So we had the hearing before your Honor on the merits of the case three or four days later. Your Honor during that time made it clear that, I think, perceptively as it turned out that one way or another this case was going to be decided by the Second Circuit, and that the best thing that you could do for the parties would be to get the case to the Second Circuit as quickly as possible.

THE COURT: Off-the-record.

(Off-the-record discussion)

THE COURT: On the record.

MR. SAUNDERS: In this case you may remember that there was a videotape of the argument so it would be hard for anyone to say that you didn't fully consider this, because I think the argument lasted for more than an hour as I recall.

In any event, what your Honor did was to deem the City's opposition to our motion for a preliminary injunction, which was before your Honor to be a motion to dismiss, and you granted that motion to dismiss, but you also entered an injunction with the proviso that we perfected an expedited appeal which we did.

The words of the injunction were important because of the particular posture in which the law was at that time. Under the law of the State of New York the Hertz Law did not become effective when the mayor signed it, which he did about a half hour before we saw you that afternoon. Instead, there was a ministerial procedure that requires ordinarily two or three days that needed to be followed in order to render the law.

THE COURT: I enjoined that procedure.

MR. SAUNDERS: You did enjoin that procedure, precisely so. I think at the moment that you entered that injunction the copy of the signed law was sitting on the desk of the Corporation Counsel, and I think that the procedures were that he, in the

ordinary course, would have then transmitted that signed law back to the City Council which would have in turn filed it with the Secretary of State in Albany, and once the law was transmitted from the City Council to the Secretary of State in Albany then it becomes effective. That whole procedure was enjoined. So as far as I know the signed law is still sitting on the corporation counsel's desk.

What has happened in the meantime is after you entered that injunction and after we perfected our expedited appeal, the City then moved in the Second Circuit to vacate the injunction, or at least to modify it so that it would expire on the date of the oral argument, and I well remember that day, because I'm not sure whether I actually even charged my client for appearing in court that day, as my recollection is that I never even got to say a word in the argument in the Second Circuit on the motion to vacate the injunction because I think I seem to recall that I was instructed by one of the judges, and I don't remember who, perhaps Judge Van Graafeilland, to sit there and not say a word.

MS. GOODMAN: However, it was not decided from the bench.

MR. SAUNDERS: Believe me it was decided from the bench. They didn't render the opinion that same minute, but it was decided from the bench.

In any event, the Second Circuit denied that motion. Then in due course after the argument on the merits in the Second Circuit, the Second Circuit certified to the New York State Court of Appeals the state preemption question which the State Court of Appeals after hearing argument on then returned to the Second Circuit with an opinion saying that the Hertz Law was not preempted by the New York State Automobile Renters Law and other New York State statutes. Then the Second circuit rendered its opinion.

THE COURT: Did it have intervening argument?

MR. SAUNDERS: The first argument was on the merits in the Second Circuit. Then there was an argument in the New York Court of Appeals.

THE COURT: Was there another argument in the Second Circuit?

MR. SAUNDERS: Because the case was fully argued the first time there was no other argument in the Second Circuit. I think the case was returned, or that one issue was returned to the Second Circuit from the New York State Court of Appeals probably in December or January. That is my recollection.

In August of this year, the Second Circuit rendered its opinion with which your Honor is familiar in this case and basically what the Second Circuit did is to remand the case to this court for consideration of two issues, one being the antitrust preemption issue and the second being commerce clause issue.

One of the questions that Second Circuit asked the City when the City moved to vacate your Honor's injunction is whether the City would pay Hertz if it turned out that the law was ultimately invalidated. That is, would the City make Hertz whole if the injunction were vacated.

THE COURT: This is while you were enjoying keeping your mouth shut.

MR. SAUNDERS: That's why I was enjoying keeping my mouth shut. The City's counsel, I think it was Ms. Goodman, said the City would not.

MS. GOODMAN: Absolutely I said it would not.

MR. SAUNDERS: That if Hertz lost money because of the imposition of a law ultimately determined to be unconstitutional, so be it.

The position we are in is this, the law is still not in effect. The republic has not crumbled in the last —

THE COURT: It's teetering though.

MR. SAUNDERS: It's teetering, but I think it could be seriously questioned whether the absence of the Hertz Law has caused the republic to teeter from time to time. I'm not aware that anybody who wishes to rent a car has not been able to rent a car, and I'm not aware that anyone who does not wish to pay Hertz's rates has

been forced or compelled to pay Hertz's rates. There are many, many alternatives available to those who wish to rent cars. I can think of a half a dozen other car rental companies that have not raised their rates the way Hertz did, and that are presumably enjoying banner business.

In any event, nobody is really being hurt by the fact that the law has not been put into effect. On the other hand, if the law is put into effect, even if the City says we are not going to enforce it, the law will be in effect and there will be absolute chaos at the rental counters because the law will be in effect, and the renters will be able to go to the rental counter and say, "You're not allowed to charge me that rate. The City law says you can't do it."

If it should ultimately be determined, as I believe it will, that the Hertz Law will be found invalid and unconstitutional, then Hertz will have suffered an injury during that interim period for which it can never be recompensed, at least as I haven't been able to figure out how to bring a personal action against the City officials who knowingly put into place an unconstitutional law in the teeth of the Second Circuit opinion, but in any event, I think Hertz would be out during that period. I can't think of a way that Hertz would be recompensed during that period.

Moreover, it the body politic would have endured a period during which there was an unconstitutional law on the books during the very same time when the constutionality of the law was being challenged, so nobody is being hurt, in my view, during the period before the law is put into effect, because I believe the law will be ultimately found unconstitutional anyway. Whereas if the law were put into effect there would be serious and irreparable, by Ms. Goodman's own words, damage to Hertz.

The position we are in is this. The City has told us that they wish to file a petition for certiorari in the Supreme Court. They have also told us, and I don't wish to speak for them and they can speak for themselves, that what they would like your Honor to do is to stay all the proceedings in this case while that petition is being heard in the Supreme Court.

THE COURT: That makes sense.

MR. SAUNDERS: But at the same time, I don't remember whether you told me that or whether Peter [Sherwood] told me that.

MS. GOODMAN: I didn't tell you that.

THE COURT: Told you what?

MR. SAUNDERS: Told me what I just said about staying the proceedings in the District Court. He did tell me that but if you have a different position, so be it. That's perfectly acceptable to us so long as the law is not in effect in the meantime. If the law is in effect in the meantime, then, that is, if your Honor should conclude that the law should be put into effect that would be a major serious problem for us. The relatively minor procedural issue is this. It's an interesting but relatively minor issue, because we are all here before you.

There was a question after the Second Circuit opinion was rendered whether your Honor's injunction was still in effect or whether it was automatically vacated by the actions of the Second Circuit. As Ms. Goodman said, your Honor's injunction said that it was in effect pending appeal.

MS. GOODMAN: Or until the Court of Appeals modifies or vacates.

MR. SAUNDERS: Which the Court of Appeals did not do. So the question was whether the action of the Court of Appeals automatically vacated the injunction.

Our preliminary view was, my instinctive view was, that it was still in effect, that this was your Honor's order, that the Second Circuit did not vacate it. It was asked to vacate it once before, it didn't vacate it. There is nothing in the opinion suggesting that the injunction was vacated. That is still your order.

THE COURT: On the contrary, the Court of Appeals said that I denied your motion, but granted your injunction, and you

appealed and she did not cross appeal, so that suggests to me that they think my injunction is still in effect.

MR. SAUNDERS: I think, although this is —

THE COURT: The words are not exact.

MR. SAUNDERS: I think that's exactly right. We did a little legal research and did find a case in which the [N]inth [C]ircuit, which we cited to Ms. Goodman, in a case in which the appellant lost on the merits with the District Court had entered an injunction similar to your Honor's where it was clear that that injunction remained in effect until the District Court then vacated the injunction, but that was a case in which the appellant lost, but the injunction was still in effect until the District Court vacated.

In any event, the City when we discussed this issue and cited this case to them, I think they took the position that that case was probably an outl[i]er case but it was the only case that we found. In any event, after we discussed that issue with the City their view was that the injunction was automatically vacated. Ours was that it wasn't. But they said, and I applaud them for it, they said that they would not do anything, that they would not take any steps to render the law effective, that is, they would not change the status quo until we had an opportunity to appear before you.

I think, if I hear what Ms. Goodman is saying, that we should make a motion to continue the injunction, we say, they should make a motion to vacate the injunction. I don't know that it really matters very much who goes first, because they have represented to us, and I assume it is still your position, that you are not going to do anything until Judge Knapp decides what to do.

THE COURT: It seems to me I can assume that both such motions are now before me, your motion to continue and her motion to vacate.

MR. SAUNDERS: That's fine.

MS. GOODMAN: Your Honor, I'd just like to say a few things. First of all, what we have here is a duly enacted statute by the City Council with the presumption of regularity. Obviously the City's not going to pay his business losses because of that statute.

Now we have a legal situation which is quite different from the one we had when your Honor issued the injunction.

THE COURT: Yes, I've been reversed.

MR. SAUNDERS: But not for issuing the injunction.

MS. GOODMAN: But Hertz did not win anything on the merits. Hertz survived a motion to dismiss and has been sent back for trial. So what we were talking about then was an injunction which would have lasted six, eight, ten weeks. As it was it lasted a year and a half about, but it was in a much different context than what we have here now.

What we have here now is the proposition that the legitimate wishes of the elected officials of the people of the City of New York, for years they can't have their law.

THE COURT: The elected officials' feelings are clearly hurt, but whether or not that's irreparable damage, I'm not sure. My feeling is that you have never suggested to me any damage that the City or anybody else is suffering by the existence of this memorandum, aside from your hurt feelings.

MS. GOODMAN: That's true, your Honor, but with all due respect it's not for us to show irreparable harm, just because we're not hurt —

THE COURT: I, the judge, have declared that I see no irreparable harm. Therefore if you want to change my mind it is up to you.

MS. GOODMAN: I accept your finding and I would agree that the City has suffered no irreparable harm.

THE COURT: The finding I made before is that no human being anywhere is hurt by this injunction of mine. I have heard nothing to suggest that that finding is wrong.

MS. GOODMAN: No, and I wouldn't argue that that finding is wrong. What I would argue though is that they have made any showing whatsoever that they are going to succeed on the merits. And there are two prongs to every injunction. They must make a showing on the merits, and they must show irreparable harm.

THE COURT: There is more showing they are going to succeed on their merits now than there was when I granted the injunction.

MS. GOODMAN: I disagree.

THE COURT: I said on the record that I thought the federal questions were frivolous and yet I granted the injunction. Now I have to eat crow. They are not frivolous. Their federal questions were viable questions which require a trial. Therefore, their request for an injunction is stronger now than it was when I granted it.

MS. GOODMAN: With all due respect, your Honor, I think that while there are viable questions they are questions of fact. They are not questions of law, and there is nothing on the record to show that they have a higher likelihood to succeed on the merits before your Honor in a plenary trial. There is nothing on the record before you to give you any supposition that they might have some likelihood of success on the merits, and I submit the standard in the Second Circuit is likelihood of success on the merits and irreparable harm. It's not my irreparable harm. I admit I have no irreparable harm and I even admit he has some harm, but he has no —

THE COURT: But when there is absolutely no harm reparable or irreparable to you, you have not shown me any injury reparable or irreparable that could be done to an human being as the result of this injunction. I have several times asked you to suggest a harm that anybody suffered by the existence of this and you haven't come up with any.

MS. GOODMAN: I agree that there is no harm to any given individual that we know of. However, there is harm to the public.

THE COURT: How is the public hurt?

MS. GOODMAN: Because when its officials enact a statute, and the court doesn't say that the statute is illegal. It says it might be given certain facts, but those facts are not here.

THE COURT: The court says the statute cannot be put into effect, and I don't know what conceivable harm any human being,

and the public is a congregation of human beings, and if no single one of them is hurt then the group hasn't been hurt.

MS. GOODMAN: Your Honor, people in the Bronx may be hurt.

THE COURT: Just tell me how?

MS. GOODMAN: Because they might want to rent a car and the only car rental place open at LaGuardia might be Hertz.

THE COURT: Has it ever happened?

MS. GOODMAN: I don't know.

THE COURT: I can tell you it has never happened.

MS. GOODMAN: I don't know how many rental car outlets there are in LaGuardia.

MR. SAUNDERS: There are no Hertz offices in the Bronx. There are at least a half a dozen at LaGuardia and there are a half a dozen in Newark, and there are probably more at JFK.

MS. GOODMAN: Isn't it possible that someone from Riverdale would want to take advantage of some mileage they got on an airplane and they come to Hertz and they rent it, they've got a certificate, and Hertz says, "Sorry, you live in Riverdale."

THE COURT: It is conceivable but I've never heard of it happening.

MR. SAUNDERS: It pains me to say this, but they could go to Avis.

MS. GOODMAN: I won't tell your client you said that.

THE COURT: But that would be cruel and unusual punishment.

MR. SAUNDERS: Perhaps not legally reparable.

MS. GOODMAN: Your Honor, I think also as a matter of law that we are hurt, and I would ask permission to make a motion to vacate the injunction.

THE COURT: You made it and it is denied.

All proceedings will be stayed until November 1st or the decision of any petition that the City may file.

MS. GOODMAN: How long will the injunction be in effect? Until the Supreme Court rules?

THE COURT: The injunction will be in effect as long as this action is pending unless someone make a motion either before me or the Court of Appeals to vacate.